

The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

OLIVIA SELTO, individually, as guardian
of minor child K.P. and as Personal
Representative of the Estate of KEVIN
PETERSON JR, deceased, TAMMI BELL,
individually and as Personal Representative
of the Estate, and KEVIN PETERSON SR,
individually,

Plaintiffs,

v.

COUNTY OF CLARK, a political
subdivision of the State of Washington;
SHERIFF CHUCK ATKINS; Sheriff's
Detective ROBERT ANDERSON; Sheriff's
Deputy JONATHAN FELLER; and JOHN
and JANE DOES 1-10, in their official and
personal capacities,

Defendants.

No. 3:22-cv-5384 BJR

**DEFENDANTS' RESPONSE TO
MOTION TO EXTEND TIME**

I. INTRODUCTION AND SUMMARY OF ARGUMENT

On September 27, 2022, the parties submitted a Joint Status Report. ECF #14. In it the parties represented that the Initial Disclosures would be filed by the deadline in five days of October 3, 2022. The Defendants served their Initial Disclosures by the deadline. Plaintiffs did not.

On December 2, 2022, the Defendants conducted a discovery conference with Plaintiffs. *Decl. of Cooley*. The purpose of the discovery conference was to seek an exchange. The Defendants would permit the late filing of Initial Disclosures and seek no sanctions. In exchange, the Plaintiffs would agree to a protective order.

The shooting in this case happened October 29, 2020. One of the shooters was Deputy Jon Feller. On January 20, 2022, approximately 15 months after the subject shooting, Deputy Feller accidentally shot and killed an off-duty Vancouver police officer. *Id.* This incident was understandably stressful for Deputy Feller. *Id.* In the Complaint, Plaintiffs suggested that they want to litigate this subsequent incident. ECF #1. In the discovery conference, Plaintiffs' counsel could not explain how an examination of Deputy Feller regarding a shooting 15 months later would be calculated to lead to admissible evidence. *Id.* It appears to be a strategy to introduce a completely irrelevant incident, and to obtain an upper hand psychologically on a defendant deputy. *Id.*

Since filing the Motion, Plaintiffs have served Initial Disclosures. As they were simply a cut and paste job, copying the Defendants' Initial Disclosure, the Defendants concede this delay is harmless. *Decl. of Cooley*.

The present motion utterly ignores the rules and case law applicable to Initial Disclosures. The Court should only grant the motion with the sanction that it should enter the protective order sought by Defendants.

II. LAW AND ARGUMENT

Rule 37(c)(1) provides that a party failing to provide Initial Disclosures, "is not allowed to use that information ... to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." *Hoffman v. Constr. Protective*

Servs., Inc., 541 F.3d 1175, 1179 (9th Cir. 2008), as amended (Sept. 16, 2008).

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TIME - 2
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1 “Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove
2 harmless. ...[I]t is the obligation of the party facing sanctions for belated disclosure to
3 show that its failure to comply with [Rule 26] was either justified or harmless....”. *Yeti by*
4 *Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001)(cleaned up,
5 with citations omitted).

6 “[W]e give particularly wide latitude to the district court's discretion to issue
7 sanctions under Rule 37(c)(1).” *Id.* Sanctions do not require a finding of bad faith or
8 willfulness, as, “automatic sanction to provide a strong inducement for disclosure of
9 material.” *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1180 (9th Cir. 2008),
10 as amended (Sept. 16, 2008).

12 Here, the Plaintiffs have admitted to the violation. ECF #20. While the general rule
13 of exclusion of evidence is not warranted, the Court still has discretion to award sanctions.
14 Here, the sanctions as proposed by Defendants is entry of a Protective Order preventing
15 Plaintiffs from examining Defendant Feller about an accidental shooting that happened 15
16 months after the instant matter.

18 “The district court enjoys broad discretion when resolving discovery disputes,
19 which should be exercised by determining the relevance of discovery requests, assessing
20 oppressiveness, and weighing these factors in deciding whether discovery should be
21 compelled” *K.C.R. v. Cnty. of Los Angeles*, CV 13-3806 PSG SSX, 2014 WL 3433925, at
22 *2 (C.D. Cal. July 14, 2014).

24 The Court should exercise its discretion and prevent this subsequent accidental
25 shooting from being the topic of Deputy Feller’s deposition.

DATED: December 21, 2022

KEATING, BUCKLIN & McCORMACK, INC., P.S.

By: /s/ Andrew Cooley

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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